

JAN 19 1993

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No. 92-486

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

EDGE BROADCASTING COMPANY, t/a POWER 94

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED
SEPTEMBER 17, 1992
CERTIORARI GRANTED DECEMBER 14, 1992

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¹ The following items were printed in the petition appendix and are not reprinted herein: (1) the opinion of the court of appeals; (2) the order denying rehearing and rehearing en banc; (3) the opinion of the district court; and (4) the district court judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA
and FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1988		
Oct. 11	1	Complaint.
1989		
Feb. 5	8	Answer.
June 26	12	Motion to amend complaint on behalf of plaintiff. Brief received.
July 7	—	<i>Court proceedings</i> before Judge Frank Kaufman. Levy Brown (Tayloe), repr. Counsel appeared. Matter came on for hearing on defendant's motion for summary judgment and plaintiff's motion to amend complaint. Arguments of counsel heard. Court's rulings stated into record. Plaintiff's motion to amend complaint GRANTED. Defendants' motion for summary judgment—DENIED. (By agreement

DATE	NR	PROCEEDINGS
		of counsel, all previous pleadings heretofore filed are applicable to amended complaint. All plaintiff's proffered exhibits listed at FPTC will be admitted if offered.) Court preparing memo and order pursuant to ruling. Counsel will meet with Court on July 14, 1989 at 9:00 A.M. re: stipulations.
July 7	15	Amended complaint.
July 14	—	<i>Court proceedings</i> before FAK, judge, no repr. Counsel appeared. Matter came on for further hearing. Comments of Court and counsel heard. Stipulation filed in open court. Supplement to order on final pretrial conference filed in open Court Counsel for plaintiff may file affidavits by noon on July 21, 1989. Arguments set July 25, 1989 at 10:00 A.M.
July 14	18	Stipulation on behalf of parties, filed in open Court.
July 25	—	<i>Trial proceedings</i> before FAK, judge. Pamela Unverzart and Margaret Mann reprs. Counsel appeared. Matter came on for trial by Court. Supplemental final pre-trial order filed in open Court. Evidence presented with introduction of exhibits, affidavits, pleadings and submissions. Arguments of counsel heard. Court takes matter under advisement. Transcript to be prepared. Government may file further submissions (briefs) by Aug. 18, 1989 and plaintiff may respond by Aug. 25, 1989, with original submissions to be sent to the Norfolk office and 2 copies of each to Judge Kaufman at Baltimore, Maryland. Court adjourned.
1990		
Feb. 28	26	Memorandum opinion, filed Feb. 26, 1990. FAK, Senior U.S. District Judge for District of Maryland. Copies mailed Feb. 28, 1990.

DATE	NR	PROCEEDINGS
1990		
Feb. 28	27	Judgment that plaintiff may operate Power 94 without being subject to the restrictions of 18 USC 1304 and 1307, and defendants are hereby enjoined from taking any action to the contrary, entered Feb. 23, 1990 and filed Feb. 26, 1990. FAK, judge. O.B. Copies mailed Feb. 28, 1990.
Apr. 20	28	Notice of appeal on behalf of defendants.
Apr. 24	—	Conformed copy of notice of appeal mailed by Clerk to Clerk, U.S. Court of Appeals (with transmittal sheet and copy of judgment and docket entries), and to Michael A. Rhine, Assistant U.S. Attorney and Margaret H. Plank, Esquire, (with notice, transcript purchase order and docketing statement), counsel for defendants, and to Conrad M. Shumadine, Esquire, Walter D. Kelley, Jr., Esquire, Cecelia Ann Wikenheiser, Esquire and Wayne G. Souza, Esquire, counsel for plaintiff.

By /s/ [Illegible]
Deputy Clerk

**U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 90-2668

**EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF-APPELLEE**

v.

**UNITED STATES OF AMERICA; FEDERAL
COMMUNICATIONS COMMISSION,
DEFENDANTS-APPELLANTS**

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
4/26/90	Civil case docketed. (kac)
10/31/90	Oral argument heard. Courtroom Deputy: sbb. [90-2668] (sbb)
2/27/92	Unpublished per curiam opinion filed. ([90-2668] (bc)
2/27/92	Judgment order filed. Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Unpublished. HEW, Dissenting Judge; RFC; CHH1, Authoring Judge. [90-2668] (bc)
3/9/92	Motion filed by Appellant FCC, Appellant US to extend time to file petition for rehearing until: 4/13/92 [1623107-1] [90-2668] (bc)
3/9/92	Clerk order filed granting motion to extend time to file pet reh [1623107-1] until: 4/13/92 Copies to all counsel. [90-2668] (bc)

Date	PROCEEDINGS
4/13/92	Petition filed by Appellant FCC, Appellant US for rehearing. Number copies filed: 15 [1637567-1], for suggestion for rehearing in banc. Number of copies filed: 15 [1637567-2] [90-2668] (bc)
4/24/92	Answer [1643166-1] to motion for rehearing [1637567-1], motion for suggestion for reh in banc [1637567-2] filed by Appellee Edge Broadcasting. [90-2668] (bc)
5/20/92	COURT ORDER filed denying motion for rehearing [1637567-1], denying motion for suggestion for reh in banc [1637567-2] Copies to all counsel. [90-2668] (bc)
5/27/92	Mandate issued. [90-2668] (rm)
5/27/92	Record on appeal returned to USDC at EDVA-Norfolk. (Pleadings: Vols. 1-2 T/S: Vols. 3-5). [90-2668] (rm)
9/24/92	Supreme Court notice that petition for certiorari was filed on 09/17/92 Spt No. 92-486. [90-2668] (ldj)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA
and FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

AMENDED COMPLAINT

[Filed July 7, 1989]

Plaintiff, Edge Broadcasting Company, for its Amended Complaint against the defendants, the United States of America and the Federal Communications Commission, alleges as follows:

PARTIES

1. Edge Broadcasting Company ("Edge") is a stock corporation existing under and by virtue of the laws of the Commonwealth of Virginia. Edge maintains its principal place of business in Virginia Beach, Virginia, and owns the 100,000-watt radio station WMYK-FM, which trades under the name "POWER 94." WMYK is licensed by the Federal Communications Commission ("FCC") to Elizabeth City, North Carolina.

2. The United States of America is the federal governing body. The Executive Branch of the United States of America is charged with enforcing the criminal laws of the United States.

3. The FCC is a federal agency which was created by Congress via the Communications Act of 1934, 48 Stat. 1064, to license and regulate, *inter alia*, radio stations in the United States of America.

JURISDICTION AND VENUE

4. Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 because this action arises under the United States Constitution.

5. An actual controversy exists between the parties, as more specifically set forth below, regarding the constitutionality of 18 U.S.C. §§ 1304 and 1307 and 47 C.F.R. § 73.1211. Accordingly, this case is a proper one for the exercise of this court's power to issue declaratory judgments pursuant to 28 U.S.C. § 2201(a).

6. Venue is properly laid in this judicial district and division pursuant to 28 U.S.C. § 1391(e) because the plaintiff resides in the Eastern District of Virginia.

FACTUAL BACKGROUND

7. On November 3, 1987, Virginia voters approved a referendum authorizing the Commonwealth to establish a lottery. Pursuant to enabling legislation, 58.1 Va. Code § 4000, *et seq.*, the Governor of Virginia thereafter appointed a Lottery Board to administer the State Lottery Department.

8. The creation of the Virginia lottery has been a boon to most radio stations in the Hampton Roads metro area as the Commonwealth has sought to promote its lottery and private enterprises have sought to capitalize on it.

9. Prior to the first sale of lottery tickets on September 20, 1988, the State Lottery Department purchased extensive promotional advertising from the Hampton Roads metro area radio stations. Private businesses also bought extensive advertising from radio stations, touting their establishments as outlets for the sale of lottery tickets.

Following the initial sale of lottery tickets, private businesses purchased further advertising, publicizing the winners whose fortunes were enhanced by patronizing their businesses and highlighting sales promotions which include lottery tickets as part of their appeal.

10. This surge in governmental and private advertising will continue in the future as the Virginia lottery continues and develops. The State Lottery Department projects that it will channel ten percent (10%) of the revenues created by the lottery into advertising and promotion, making the Commonwealth the single largest advertiser in Virginia. Furthermore, the creation, operation, and progress of the lottery has been the topic of numerous broadcasts by radio stations in Hampton Roads. The lottery will remain a source of newsworthy information for as long as it endures.

11. Twenty-four (24) commercial radio stations operate in the Hampton Roads metro area. All of these radio stations—except POWER 94 (and one low-power FM station)—have the lawful ability and right to broadcast advertising and information about the Virginia lottery. POWER 94 was and is prohibited by federal law from broadcasting any advertisements or information about the state-sponsored lottery.

12. Section 1304 of the United States Criminal Code, 18 U.S.C. § 1304, prohibits the broadcast of advertisements or information concerning lotteries. Any broadcaster who violates this section is subject to a fine of up to \$1,000 and/or imprisonment up to one year.

13. The FCC has issued administrative regulations, 47 C.F.R. § 73.1211, which are identical in substance to the federal criminal statute outlined above. Any broadcaster who violates these regulations is subject to penalties ranging from a fine to license revocation.

14. An exception removes radio stations "licensed to a location" in Virginia from the prescriptions of § 1304 and the attendant federal regulations. Section 1307 of

the United States Criminal Code, 18 U.S.C. § 1307, permits radio stations licensed to a state with a state-sponsored lottery to broadcast advertisements and/or information about that lottery or the official lottery conducted in an adjacent state. Radio stations licensed to a state that does not have an official lottery are still prohibited from broadcasting any lottery advertisements or information whatsoever.

15. POWER 94 has its studios and corporate offices in Virginia Beach, Virginia. Approximately ninety percent (90%) of its listeners reside in Virginia. It derives more than ninety-five percent (95%) of its local advertising revenues from Virginia-based advertisers.

16. Even though its business is predominantly in Virginia, POWER 94 is licensed by the FCC to Elizabeth City, North Carolina. Because POWER 94 is "licensed to a location" in North Carolina and because North Carolina does not have a state-sponsored lottery, the statutes and regulations described above forbid POWER 94 from broadcasting the same information about the *Virginia* lottery that its competitors freely disseminate. POWER 94 is prohibited from broadcasting newsworthy information about the lottery, even though the same information is regularly carried into the area of North Carolina served by POWER 94 by its competitors and other Virginia television stations, newspapers, and periodicals.

17. The statutes and regulations outlined above do not directly advance any asserted governmental interest. The citizens of North Carolina residing within the area reached by POWER 94's signal are bombarded with Virginia lottery advertisements and information broadcast by the Virginia radio and television stations which service the area. These same North Carolinians are also inundated with Virginia lottery advertisements and information published by Virginia newspapers which serve the area of North Carolina reached by POWER 94's signal. Thus, despite the federal prohibitions, North Car-

olinians residing in the area served by POWER 94 are saturated with Virginia lottery information and advertising. No governmental interest whatsoever is furthered by forbidding POWER 94 from broadcasting information and advertising which already blankets the area via Virginia radio and television stations and newspapers.

18. POWER 94 is suffering and will continue to suffer substantially irreparable injury as a result of the governmental restraints placed upon its right to broadcast advertisements and/or information about the Virginia lottery. It has lost and is continuing to lose significant advertising revenue from both the Virginia Lottery Department and private advertisers. Because of the proscription against broadcasting any advertisements and/or information about the lottery, POWER 94 will sustain future losses, amounting to millions of dollars. POWER 94 is being forced to alter, at its own expense, standard advertisements to delete all references to the Virginia lottery. POWER 94 is also experiencing difficulties in determining what information, if any, it may lawfully broadcast about the Virginia lottery. Consequently, it broadcasts no Virginia lottery information, whatsoever. In addition, POWER 94's ratings are threatened because it is unable to provide the lottery information that the vast majority of its listeners wish to hear and its competitors provide. All of these effects are diminishing and will continue to diminish the value of the station and deprive its owner, Edge, of the value of its investment.

19. Edge has no adequate remedy at law.

CONSTITUTIONAL VIOLATIONS

20. The statutes and regulations outlined above, as applied to Edge, act as a prior restraint on Edge's right to free speech in violation of the First Amendment to the United States Constitution.

21. The statutes and regulations outlined above, as applied to Edge, violate Edge's right to free speech in

violation of the First Amendment to the United States Constitution.

22. The statutes and regulations outlined above are arbitrary, capricious, and discriminatory, as applied to Edge, and deprive Edge of its right to equal protection under the law in violation of the due process clause of the Fifth Amendment to the United States Constitution.

23. The statutes and regulations outlined above, as applied to Edge, are arbitrary, capricious, and discriminatory, bear no reasonable relation to a proper governmental objective, and deprive Edge of its right to substantive due process in violation of the due process clause of the Fifth Amendment to the United States Constitution.

24. The statutes and regulations outlined above and as applied to prohibit Edge from broadcasting Virginia lottery information and prize lists sweep within their ambit activities which are constitutionally protected and thus are overbroad, exerting a chilling effect on Edge's exercise of its right to free speech in violation of the First Amendment to the United States Constitution.

25. The statutes and regulations outlined above and as applied to Edge, which make the broadcasting of "any information" about the Virginia lottery a crime, are so vague and indefinite that they sweep within their broad scope activities that are constitutionally protected and require people of common intelligence to guess at their meaning and differ as to their application in violation of the due process clause of the Fifth Amendment to the United States Constitution.

RELIEF REQUESTED

WHEREFORE, Edge Broadcasting Company prays for the following relief:

(a) That this Court determine and declare that 18 U.S.C. §§ 1304 and 1307 and 47 C.F.R. § 73.1211, as ap-

plied to Edge, violate the Constitution of the United States of America;

(b) That this Court preliminarily and permanently enjoin defendants from enforcing 18 U.S.C. §§ 1304 and 1307 and 47 C.F.R. § 73.1211 against Edge; and

(c) That Edge be awarded the costs of this suit, together with such other and further relief as may be necessary and proper, or as the case may require.

EDGE BROADCASTING COMPANY,
t/a POWER 94

By /s/ Cecilia A. Wikenheiser
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

ANSWER OF ALL DEFENDANTS

[Filed Feb. 15, 1989]

Defendants, by their undersigned attorneys, answer the complaint as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of plaintiff's challenge to FCC regulations, as jurisdiction to review FCC orders is exclusive in the United States Courts of Appeal.

Third Defense

The complaint presents a facial challenge to the constitutionality of the restriction on commercial speech embodied in 18 U.S.C. §§ 1304 and 1307. Plaintiff's allegations that the statutory scheme unconstitutionally re-

stricts non-commercial speech, and plaintiff's request for a declaration that the statute may not constitutionally [sic] be applied to particular expressions, are not ripe for judicial review.

Fourth Defense

Defendants answer the numbered paragraphs of the complaint as follows:

1. Defendants admit the allegations contained in this paragraph.
2. Defendants admit the allegations contained in this paragraph.
3. Defendants admit the allegations contained in this paragraph.
4. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.
5. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.
6. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.
7. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the second sentence of this paragraph.
8. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in this paragraph.
9. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in this paragraph.

10. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in this paragraph.

11. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the first two sentences of this paragraph. Defendants admit that §§ 1304 and 1307 prohibit plaintiff from broadcasting advertisements or information that directly promotes the state-sponsored lottery. Defendants deny that §§ 1304 and 1307 prohibit the broadcasting of other information concerning the state-sponsored lottery, and respectfully refer the Court to those statutory provisions for a full and complete statement of their contents.

12. Defendants admit that 18 U.S.C. § 1304 prohibits the broadcast of advertisements or information that directly promotes lotteries. Defendants deny that § 1304 prohibits the broadcasting of other information concerning lotteries, and respectfully refer the Court to that provision for a full and complete statement of its contents.

13. Defendants admit that the FCC has issued administrative regulations pertaining to lottery advertising, and respectfully refer the Court to 47 C.F.R. § 73.1211 for a full and complete statement of its contents.

14. Defendants admit that 18 U.S.C. § 1307 permits radio stations licensed to locations in a state that sponsors a lottery to broadcast advertisements or information that directly promotes that lottery or the official lottery of an adjacent state. Defendants admit that 18 U.S.C. § 1307 prohibits stations licensed to locations in a state that does not have an official lottery from broadcasting advertisements and other information that directly promotes an official lottery in another state. Defendants deny that 18 U.S.C. §§ 1304 and 1307 prohibit the broadcasting of other information concerning an official state lottery by a station licensed to a location in a state that does not have an official lottery, and respectfully refer the Court to those

statutory provisions for a full and complete statement of their contents.

15. Defendants admit the allegations contained in the first sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the second and third sentences of this paragraph.

16. Defendants admit that POWER 94 is licensed by the FCC to Elizabeth City, North Carolina. Defendants have insufficient information upon which to form a belief with respect to the truth of the remaining allegations contained in this paragraph.

17. Defendants deny the allegations contained in the first sentence of this paragraph. Defendants admit the allegations contained in the second sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the allegations contained in the third and fourth sentences of this paragraph.

18. Defendants deny the allegations contained in the first sentence of this paragraph. Defendants have insufficient information upon which to form a belief with respect to the truth of the remaining allegations contained in this paragraph.

19. This paragraph states a conclusion of law to which no response is required. To the extent that a response is required, defendants deny the allegations contained in this paragraph.

20. Defendants deny the allegations contained in this paragraph.

21. Defendants deny the allegations contained in this paragraph.

22. Defendants deny the allegations contained in this paragraph.

23. Defendants deny the allegations contained in this paragraph.

24. Defendants deny the allegations contained in this paragraph.

25. Defendants deny the allegations contained in this paragraph.

26. Defendants deny the allegations contained in this paragraph.

All averments of plaintiff's complaint not expressly admitted herein are denied.

Defendants deny that plaintiff is entitled to the relief prayed for in this action or to any relief whatsoever.

WHEREFORE, defendants pray that the instant action be dismissed with prejudice and that the Court grant defendants such other and further relief as may be appropriate. -

Respectfully submitted,

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HENRY HUDSON
United States Attorney

/s/ Michael Rhine
Assistant United States
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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, DEFENDANTS

STIPULATION

On July 7, 1989, in open court, the Court denied defendants' Motion for Summary Judgment. Defendants' Motion contained a Statement of Material Facts Not in Dispute that was based upon the uncontroverted allegations of plaintiff's Complaint and plaintiff's Admissions. In denying defendants' Motion, the Court overruled defendants' objections to the relevance and materiality of any additional facts plaintiff sought to make of record in this litigation. To facilitate the creation of plaintiff's factual record and thereby reduce the amount of time required for trial of this matter, defendants have agreed to enter into the stipulations set forth below. Defendants' agreement does not constitute a waiver of defendants' position that plaintiff's Complaint presents a facial attack on the constitutionality of 18 U.S.C. §§ 1304 and 1307, and that the facts set forth below that plaintiff sought to make of record—both those that are additional to, *see* ¶¶ 21-24, 29-31, 37, 44-67, and those that elaborate on those upon which defendants based their Motion for Summary Judgment,

ment, *see* ¶¶ 25-26, 33-36, 38-43—are not relevant or material to the resolution of this litigation. Neither do defendants hereby waive their position that the challenged statutes proscribe the broadcast solely of commercial speech, and that the proscription against the broadcast of commercial speech embodied in those provisions comports with the First and Fifth Amendments.

Stipulation of Uncontroverted Facts

Come now plaintiff and defendants, by and through their respective counsel, and stipulate to the facts set forth below:

1. Edge Broadcasting Company ("Edge") is a stock corporation existing under and by virtue of the laws of the Commonwealth of Virginia. Edge's studios and corporate offices are located in Virginia Beach, Virginia.
2. Edge owns the 100,000 watt radio station WMYK-FM. Power 94 is the trade name for WMYK.
3. The Federal Communications Commission ("FCC") is the agency of the United States government authorized, among other things, to license and regulate radio stations.
4. WMYK is licensed by the FCC to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina, a town located approximately three (3) miles from the border between Virginia and North Carolina. In the 1970's the FCC granted WMYK a dual identification for advertising purposes of Elizabeth City and Virginia Beach.
5. Since 1983, a broadcast licensee wishing to announce a dual identification has not required FCC approval.
6. Edge acquired the FCC license to WMYK at a closing which took place in Cleveland, Ohio, on May 28, 1988, by written assignment which had, by its terms, the effective date of May 31, 1988. The acquisition of the FCC license was pursuant to prior written consent of the FCC on March 24, 1988, Public Notice No. 20285,

Mimeo No. 2295, released March 29, 1988, FCC File No. BADLH-871230HS.

7. Edge knew at the time it acquired the FCC license to WMYK that the station was licensed by the FCC to Elizabeth City, North Carolina.

8. Acquisition of a broadcast license subjects the licensee to regulation by the FCC. At the time it acquired the license to WMYK, Edge knew or should have known of the applicable FCC statutes and regulations.

9. The radio spectrum is not large enough to accommodate an unlimited number of users. The FCC is directed to distribute channel allotments "among the several States and communities [so] as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b).

10. All broadcast licensees are licensed to a particular community. 47 C.F.R. Part 73.1120.

11. A primary obligation of broadcast licensees is to serve the needs and interests of their community of license.

12. Dual identification does not alter a licensee's primary service obligation to its community of license.

13. The location of a station's studios or transmitter does not affect its primary obligation to serve its community of license.

14. The State of North Carolina does not sponsor a lottery.

15. N. Car. Gen. Stat. § 14.289 provides as follows:

Except in connection with a lawful raffle as provided in Part 2 of this Article, if anyone by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or

how it may be obtained, he shall be guilty of a misdemeanor. . .

16. N. Car. Gen. Stat. § 14.291 provides as follows:

Except in connection with a lawful raffle as provided in Part 2 of this Article, if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a misdemeanor.

17. At the general election on November 3, 1987, a majority of Virginia voters approved a referendum creating a state-run lottery. The lottery is designed to "produce revenue consonant with the probity of the Commonwealth and the general welfare of the people." Va. Code Ann. § 58.1-4001 (1987). The revenue produced by the lottery is to "be used for the public purpose." *Id.* The State Lottery Law created an independent agency, the State Lottery Department, which includes a director and a State Lottery Board, charged with operating the state lottery. *Id.* at § 58.1-4003. Copies of the Virginia State Lottery Law are included in the accompanying Joint Exhibits as Exhibit A.

18. Section 1304 of Title 18 of the United States Code provides that:

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or

scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1304.

Section 1307 of Title 18 exempts from criminal liability

(a) . . . an advertisement, list of prizes, or information concerning a lottery conducted by a state acting under the authority of state law—

* * *

(2) broadcast by a radio or television station licensed to a location in that state or an adjacent state which conducts such a lottery.

18 U.S.C. § 1307.

Corresponding regulations embodying the same substantive restrictions on lottery advertising as the statute are contained in 47 C.F.R. Part 73.1211. Title 47 U.S.C., Section 312(a) provides that the FCC "may revoke any station license . . . (6) for violation of section 1304 . . . of Title 18." The statute also provides for civil forfeiture not to exceed \$1,000 upon a finding of a § 1304 violation. 47 U.S.C. § 503(b) (1) (E).

19. The purpose articulated by Congress for enacting the statutory scheme embodied in 18 U.S.C. §§ 1304 and 1307 was that of "freeing the means of communication to State-run lotteries to the maximum extent possible consistent with adequate Federal recognition of and protection for the policy of non-lottery States." S. Rep. 93-1404, 93d Cong., 2d Sess. 3 (1974).

20. Edge has neither been prosecuted nor threatened with prosecution under 18 U.S.C. §§ 1304 and 1307. Edge has not been threatened with license revocation pursuant to 47 U.S.C. § 312(a).

21. The Virginia State Lottery Board has promulgated regulations governing advertising conducted by both the Lottery Board and lottery retailers—businesses licensed

by the Director to sell and dispense lottery materials. Va. Regs. Reg. 447-01-2 § 1.1. A copy of these regulations is included in the accompanying Joint Exhibits as Exhibit B. The statutory and regulatory restrictions on Virginia lottery advertising apply to both the Lottery Department and private retailers.

22. The Office of the Attorney General has instituted a review procedure for checking Virginia state lottery advertising to determine that it complies with the statutory mandate that "no funds shall be expended for the primary purpose of inducing persons to participate in the lottery." Va. Code Ann. § 58.1-4022 (1987).

23. The Virginia lottery includes games of the "instant winner" variety. To play, a participant buys a ticket at any licensed retailer. The ticket, which costs \$1.00, is imprinted with six numbers covered by a latex coating. The purchaser scratches off the coating and determines whether he or she has won. To date, the Virginia lottery has sponsored six "instant games." Each game runs 8 to 10 weeks, or until all the tickets are sold. Game 1, "Match Three" began on September 20, 1988. Game 2, "Money Match," began on October 20, 1988. Game 3, "Tic-Tac-Toe," began on December 15, 1988. Game 4, "Loose Change," commenced on February 16, 1989. Game 5, "Double Play," began on April 13, 1989. The lottery is currently sponsoring Game 6, "At the Races." Virginia anticipates launching new "instant games" approximately every eight weeks for the duration of the lottery.

24. The first "on-line" lottery game, "Pick 3," began in Virginia in May 1989. These more sophisticated games are played by computer. To play, a participant selects a group of numbers and finds out either daily or at the end of the week whether his or her selections have matched the numbers selected randomly by the Lottery Board. The Lottery Board anticipates beginning an additional "on-line" game, "Lotto," in early 1990. An-

other "on-line" game, "Pick 4," will begin in 1991. The Lottery Board anticipates continuing the "on-line" games for the duration of the lottery.

25. Information provided by the Lottery Board indicates that the Lottery Board has expended the following sums for statewide advertising for the first three instant games, excluding the cost of producing the advertisements:

Introductory Campaign (9/7-9/19)	
Television	\$ 691,380.00
Radio	\$ 137,322.00
Newspapers	\$ 374,203.00
TOTAL	\$1,202,905.00
Game One (9/20-10/30)	
Television	\$ 694,249.00
Radio	\$ 412,216.00
Newspapers	\$ 495,216.00
TOTAL	\$1,601,528.00
Game Two (10/20-11/27)	
Television	\$ 683,319.00
Radio	\$ 337,145.00
Newspapers	\$ 525,960.00
TOTAL	\$1,467,530.00
Game Three (12/15-1/22)	
Television	\$ 537,934.00
Radio	\$ 343,046.00
Newspapers	\$ 404,161.00
TOTAL	\$1,285,141.00

26. Information provided by the Lottery Board indicates that the Lottery Board anticipates spending between \$1 million and \$1.5 million for media buys associated with each of the instant ticket games. The Lottery Board anticipates spending approximately \$2.3 million for media

buys associated with introducing each of the first two "on-line" games, "Pick 3" and "Lotto." The Lottery Board anticipates spending approximately \$3 million a year on media buys to sustain the "on-line" games.

27. The amount of funds expended and the type, frequency, and media used for advertising the second instant game, "Money Match" are typical of the expenditures and advertising for all the instant games.

28. The advertising sponsored by the Virginia lottery for "Money Match" is representative of the advertising produced by the Virginia state lottery for each of the instant games. Copies of the scripts of the three radio spots aired throughout the duration of "Money Match" are included in the accompanying Joint Exhibits as Exhibits C1, C2, and C3. An audio tape of these three radio advertisements is included in the accompanying Joint Exhibits as Exhibit D.

29. The period for state-sponsored lottery advertising for "Money Match" was five and one-half weeks: October 20-23; October 24-29; October 30-November 6; November 7-12; November 13-19; November 20-27.

30. Copies of the scripts of the two television advertisements aired throughout the duration of "Money Match" are included in the accompanying Joint Exhibits as Exhibits E1 and E2. A videotape of these advertisements is included in the accompanying Joint Exhibits as Exhibit F.

31. Reduced copies of the proofs of the full page and "double-truck" ads (two full pages) which ran in the *Virginian-Pilot* and *Ledger-Star* throughout the duration of "Money Match" are included in the accompanying Joint Exhibits as Exhibit G.

32. Radio and television signals do not stop at state lines.

33. Those citizens of North Carolina residing within the area reached by Power 94's signal, *see* ¶ 37, *infra*, are exposed to Virginia Lottery advertisements broadcast

by Virginia television stations and Virginia radio stations, and published in Virginia newspapers.

34. There are twenty-four commercial radio stations in the Hampton Roads metro area.

35. The Lottery Board purchases radio advertising time from the following seven Hampton Roads radio stations licensed by the FCC to locations in Virginia: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. WCMS, WTAR, WLTY, WOWI, WNOR, and WNVZ are licensed to Norfolk. WFOG is licensed to Suffolk. The broadcast signals of these stations reach the area of North Carolina served by Power 94.

36. The broadcast signals of Power 94 and the Virginia radio stations from which the Virginia lottery buys advertising reach the following counties in North Carolina: Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans.

37. The population estimates of these counties utilized by Arbitron in its rating surveys are: Camden, 5000; Chowan, 11,700; Currituck, 11,900; Dare, 17,900; Pasquotank, 25,100; and Perquimans, 9,100; Total: 127,600. See Exhibit H in Accompanying Joint Exhibits (Population Estimates by County—Arbitron Ratings/Radio Fall 1988). The total population of North Carolina is 6,413,000. Fewer than 2% percent of all North Carolinians reside in the area reached by Power 94's signal.

38. The Arbitron Ratings Company ("Arbitron") compiled an estimate of the radio audience for a typical week in the Fall of 1988 for all radio stations, including Power 94, serving the area of dominant influence (ADI), which includes the North Carolina counties reached by Power 94's signal. The radio audience estimate is included in the Joint Exhibits as Exhibit I.

39. According to the adjusted Arbitron estimate, seventy-nine percent of all radio stations whose broadcast signals reach the area of North Carolina served by Power

94 are licensed to locations in Virginia. According to the estimate, approximately sixty-two percent of all radio listening by residents of the area in North Carolina served by Power 94 is directed to radio stations licensed to locations in Virginia. According to the adjusted Arbitron estimate, thirty-eight percent of all radio listening in the area of North Carolina reached by the broadcast signals of Power 94 and the Virginia stations identified above is directed to Virginia radio stations that broadcast lottery advertising. Eleven percent is directed to Power 94. The remaining percentage is directed to other radio stations that do not broadcast Virginia lottery advertising.

40. According to the Arbitron estimates, approximately 92.2% of Power 94's audience resides in Virginia, and approximately 7.8% resides in North Carolina.

41. During the five and one-half week advertising period for "Money Match," Virginia stations whose signals reach the area of North Carolina served by Power 94 broadcast 452 60-second spots advertising the Virginia lottery.

42. Arbitron's radio estimate gives the "average quarter-hour audience," which estimates the average number of adults, age 18 or older, in the area of dominant influence, who had their radios tuned to any particular radio station during any given quarter-hour during a typical week in the Fall of 1988. On any day, during any given quarter hour, when a Virginia radio station aired a lottery advertisement between 6:00 A.M. and midnight during the "Money Match" campaign in the area served by Power 94's signal, Arbitron's estimate shows that an average radio audience of 4,400 North Carolinians over the age of 18 had their radios tuned to Virginia radio stations.

43. On an average day during the "Money Match" campaign, a total of 12 Virginia lottery advertisements were aired over the Virginia radio stations whose signals reach the area in North Carolina served by Power 94.

Copies of the time orders for each of the Virginia radio stations broadcasting Virginia lottery advertising are included in the Joint Exhibits as Exhibit J.

44. The Lottery Board purchases advertising time from four Hampton Roads area television stations: WAVY, WVEC, WTKR, and WTVZ. Television signals generally cover a wider area than radio signals, and these television signals reach a larger area of North Carolina than Power 94.

45. All of the North Carolina counties served by Power 94 are reached by the broadcast signals of WAVY, WVEC, WTKR, and WTVZ.

46. Arbitron reports estimate that there are 53,200 television households in the area reached by Power 94's signal and the signals of the Virginia television stations that air Virginia lottery advertising.

47. Arbitron audience surveys reflect that 64% of all television viewing in these North Carolina counties is directed to Virginia television stations that air Virginia lottery advertising.

48. During the five and one-half week advertising campaign for "Money Match," a total of 274 television advertisements were broadcast by the Virginia television stations whose broadcast signals reach the North Carolina counties served by Power 94.

49. On a typical day during the five and one-half week advertising campaign for "Money Match," an average total of seven Virginia lottery advertisements were broadcast by the Virginia television stations whose broadcast signals reach the counties of North Carolina served by Power 94. Copies of the time orders specifying the time and day for Virginia lottery advertising on the Virginia television stations whose broadcast signals reach the same area as the signal of Power 94 are included in the Joint Exhibits as Exhibit K.

50. Camden County has 2,000 households. Arbitron reports indicate that 100% of these households have at least one television set. Arbitron surveys reflect that 89%

of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

51. Chowan County has 5,150 households. Arbitron reports indicate that 98% or 5,050 of these households have at least one television set. Arbitron surveys reflect that 68% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

52. Currituck County has 5,250 households. Arbitron reports indicate that 98% or 5,150 of these households have at least one television set. Arbitron surveys reflect that 68% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

53. Dare County has 7,650 households. Arbitron reports indicate that 97% or 7,450 of these households have at least one television set. Arbitron surveys reflect that 42% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

54. Gates County has 3,150 households. Arbitron reports indicate that 97% or 3,050 households have at least one television set. Arbitron surveys reflect that 82% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

55. Hertford County has 8,050 households. Arbitron reports indicate that 99% or 7,950 of these households have at least one television set. Arbitron surveys reflect that 74% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

56. Northampton County has 7,600 households. Arbitron reports indicate that 98% or 7,450 households have at least one television set. Arbitron surveys reflect that 28% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

57. Pasquotank County has 11,350 households. Arbitron reports indicate that 99% or 11,200 of these households have at least one television set. Arbitron surveys reflect that 76% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising.

58. Perquimans County has 3,900 households. Arbitron reports indicate that 100% or 3,900 of these households have at least one television set. Arbitron surveys reflect that 82% of all television viewing in these households is directed to Virginia television stations that air Virginia lottery advertising. The relevant portions of the Arbitron Television County Coverage Report, from which Stipulations 50-58 were derived, are included in the Joint Exhibits at Exhibit L.

59. The Television Bureau of Advertising estimates that in an average American household, the television set is turned on for seven hours and eight minutes per day. See TV Basics, included in the Joint Exhibits as Exhibit M.

60. Statistical surveys conducted by the Television Bureau of Advertising estimate that American adults divide their time spent with major media as follows: watching television—60%; listening to the radio—29%; reading magazines—4%; reading newspapers—7%. Survey conductors assume that television and radio audiences alternate between various stations while watching television or listening to the radio.

61. Nielsen surveys published by the Television Bureau of Advertising estimate that in an average television household, the television set will be turned on for 7 hours and 35 minutes per day. These surveys indicate that men watch television an average of four hours and fourteen minutes a day; women watch an average of five hours and twelve minutes a day; teenagers between the ages of twelve and seventeen watch an average of three hours and eight minutes a day; and children between the ages of two and eleven watch an average of three hours and forty minutes a day. See TV Basics, Exhibit M.

62. Radio industry surveys estimate that 96.1% of all American men and 95.7% of all American women over the age of 18 listen to the radio during any given week. The surveys indicate that American men over the age of 18 listen to the radio an average of 2.55 hours every day; American women over the age of 18 listen to the radio an average of 2.53 hours every day; and all Americans over the age of 12 listen to the radio an average of 3 hours a day. The same surveys estimate that 99% of all American households have radios, and that radio households average 5.6 radios per household. The same surveys estimate that 61% of all adults have radio at work and listen to the radio 53% of the time. The same surveys estimate that 95% of all automobiles have radio, and that 77% of all adults are reached every week by car radio. See "Why Radio," Radio Advertising Bureau Statistics, included in Joint Exhibits as Exhibit N.

63. The Lottery Board purchases newspaper advertising from the Virginian-Pilot and the Ledger-Star newspaper. The Virginian-Pilot is the morning edition; the Ledger-Star is the evening edition and the Virginian-Pilot/Ledger-Star is the Saturday morning and Sunday edition. These newspapers have circulation in the following North Carolina counties reached by Power 94 signal: Camden, Chowan, Currituck, Dare, Gates, Hertford, Pasquotank, Perquimans, and Northampton. To advertise "Money Match" and the other instant games, the Lottery Board purchased "double-truck" and full-page ads to announce the instant games and fractional ads to sustain sales. A "double-truck" ad covers two full left and right pages in a newspaper. To advertise "Money Match" and other games, the Virginia Lottery Board runs ads during introductory periods on the average of two times a week in the daily editions of the Virginian-Pilot and the Ledger Star and one ad in the weekend editions of the Virginian-Pilot/Ledger Star. These newspapers regularly publish news stories about the Virginia lottery.

64. During weekdays in the five and one-half week advertising period for "Money Match," 10,377 Virginia newspapers containing Virginia lottery advertisements were distributed in the North Carolina counties which are reached by Power 94's signal.

65. On Saturdays during the five and one-half week advertising period for "Money Match," 11,241 newspapers containing Virginia lottery advertisements were distributed in the North Carolina counties reached by Power 94's signal.

66. On Sundays during the five and one-half week advertising period for "Money Match," 12,498 newspapers containing Virginia lottery advertisements were distributed in the North Carolina counties reached by Power 94's signal. See Audit Bureau of Circulations, ABC Audit Report: Newspaper, the Virginian-Pilot (morning), the Ledger-Star (evening), the Virginian-Pilot/Ledger-Star (Saturday morning and Sunday) (April 1988), included in the accompanying Joint Exhibits as Exhibit O.

67. North Carolina newspapers regularly report news and information pertaining to the Virginia lottery.

68. There are approximately 1,414 business establishments in the Hampton Roads metro area that have been selected to sell Virginia Lottery tickets to the general public. Many of these outlets include in their advertising copy the fact that they sell Virginia lottery tickets.

69. There will likely continue to be private business establishments in the Hampton Roads metro area that will continue to include their affiliation with the lottery in their advertisements.

/s/ Conrad M. Shumadine
CONRAD M. SHUMADINE
WILLCOX & SAVAGE, P.C.
1800 Sovran Center
One Commercial Place
Norfolk, VA 23510-2197
Attorney for Plaintiff

/s/ Margaret H. Plank
MARGARET H. PLANK
Federal Programs Branch
Department of Justice
10th & Pennsylvania Ave.
Washington, D.C. 20530
Attorney for Defendants

NOTE

RE: IDENTIFICATION OF EXHIBITS

In the stipulation, the parties identified the exhibits by letter and referred to a document called "Joint Exhibits." Since the court has ruled that all of plaintiff's trial exhibits are admissible, to avoid cluttering the record, POWER 94 has referred to the numbered trial exhibits both in its brief and in the supplemental affidavits submitted in lieu of live testimony. The chart below indicates the names of the exhibits referred to in the stipulation and the comparable number in the trial exhibits.

CHART		
Joint Exhibit Number	Exhibit Description	Trial Exhibit Number
A	Virginia State Lottery	Law P/T No. 1
B	Virginia State Lottery Regulations	P/T No. 5
C1, C2 and C3	Scripts of three radio spots aired throughout the duration of "Money Match"	P/T Nos. 2, 3, and 4
D	Audio tape of lottery radio advertisements	P/T No. 6
E1 and E2	Copies of scripts of two television advertisements aired throughout "Money Match"	P/T Nos. 7, and 8
F	Videotape of lottery television advertisements	P/T No. 9
G	Full-page and double-truck ads which appeared in <i>The Virginian-Pilot</i> and <i>The Ledger-Star</i> throughout "Money Match"	P/T Nos. 10, 11, and 12
H	Population estimates by county—Arbitron's Rating/Radio, Fall, 1988	P/T No. 13

Joint Exhibit Number	Exhibit Description	Trial Exhibit Number
I	Weekly radio audience estimate compiled by Arbitron Ratings Company dated Fall, 1988	P/T No. 14
J	Copies of time orders for each Virginia radio station broadcasting lottery advertising	P/T Nos. 15, 16, 17, 18, 19, and 20
K	Time orders for Virginia lottery advertising on Virginia television stations	P/T Nos. 21, 22, 23, and 24
L	Excerpts from Arbitron Television County Coverage Report	P/T No. 25
M	TV basics	P/T No. 26
N	"Why Radio?," Radio Advertising Bureau of Statistics	P/T No. 27
O	ABC Audit Report: Newspaper, <i>The Virginian-Pilot</i> (morning), <i>The Ledger-Star</i> (evening), <i>The Virginian-Pilot</i> and <i>The Ledger-Star</i> (Saturday morning and Sunday), dated April, 1989	P/T No. 28

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

I, Michael C. Knaisch, being duly sworn, state as follows:

1. I am Vice President and Group Supervisor at Lawler Ballard, the agency which was awarded the contract to promote the Virginia State Lottery.
2. I am account supervisor for the Virginia State Lottery account.
3. Lawler Ballard has submitted all its copy to the Office of the Virginia Attorney General and has obtained the approval of the Attorney General before promulgating any of the lottery advertising.
4. The advertising sponsored by the Virginia lottery for the second instant game, "Money Match," is representative of the advertising produced by the Virginia state lottery for each of the instant games. The amount of funds expended and the type, frequency, and media used for advertising "Money Match" are typical of the expenditures and advertising for all the instant games.

5. Copies of the scripts of the three radio spots aired on WCMS, WFOG, WTAR, WLTY, WOWI, WNOR, and WNVZ, and WTAR-AM throughout the duration of "Money Match," included in Plaintiff's response to Defendants' Motion for Summary Judgment, are genuine and representative of the radio advertising produced by the Lottery for all of the instant games.

6. Copies of the scripts of the two television advertisements aired throughout the duration of "Money Match" included in Plaintiff's response to Defendants' Motion for Summary Judgment, are genuine and are representative of the television advertising produced by the Lottery for all of the instant games.

7. Reduced copies of the proofs of the full page and "double-truck" ads (two full pages) which ran in The Virginian-Pilot and Ledger-Star throughout the duration of "Money Match" genuine [sic] and are representative of the newspaper advertisements produced by the lottery for all the instant games.

8. Few people receive all of their information from one media or even from one segment of a particular type of media. Televisions [sic] viewers tend to switch from station to station depending on programming and content. Radio listeners tend to switch from station to station. Newspaper readers also tend to read books, magazines and other periodicals in addition to a particular newspaper. The same people who watch television also listen to the radio and read newspapers.

9. There is no identifiable group of class of individuals within the area reached by Power 94's signal that would listen exclusively to North Carolina radio stations, watch only North Carolina television stations, or read only publications published in North Carolina. In fact, Virginia television and radio stations are the predominant choice of viewers and listeners in this area.

10. Those citizens of North Carolina residing within the area reached by Power 94's signal are constantly exposed to Virginia Lottery advertisements on the Vir-

ginia television stations, on the Virginia radio stations, and in the Virginia published newspapers.

11. The Lottery Board purchases radio advertising from the following Hampton Roads radio stations: WCMS-FM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WOWI-FM, and WNVZ-FM. WCMS, WTAR, WLTY, WOWI, WNOR, and WNVZ are licensed to Norfolk. WFOG is licensed to Suffolk. All these stations broadcast into the area of North Carolina reached by Power 94.

12. During the five and one-half week advertising period for "Money Match," Virginia radio stations broadcast 452 60-second spots advertising the Virginia lottery into the area of North Carolina reached by Power 94's signal.

13. On an average day during the "Money Match" campaign, 12 Virginia lottery advertisements were aired over the 7 Virginia radio stations, serving the area in North Carolina reached by Power 94's signal.

14. The Lottery Board purchases advertising from four Hampton Roads television stations: WAVY, WVEC, WTKR and WTVZ.

15. During the five and one-half week advertising campaign for "Money Match," 274 television advertisements were broadcast by the Virginia television stations serving the North Carolina counties reached by Power 94's signal.

16. On a typical day during the five and one-half week advertising campaign for "Money Match," Virginia television stations broadcast an average of seven Virginia lottery advertisements into the area reached by Power 94's signal.

17. It is not cost effective for advertisers to produce special advertisements solely to be run on Power 94 as opposed to the Hampton Roads radio stations as a group.

/s/ Michael C. Knaisch

STATE OF VIRGINIA
CITY OF NORFOLK

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Michael C. Knaisch, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

This 15th day of June, 1989.

/s/ [Illegible]

Notary Public

My commission expires:
7/24/89

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

Kenneth W. Thorson, being first duly sworn, states:

1. I am the Director of the Virginia State Lottery ("Lottery"). I was appointed by the Governor of Virginia on December 4, 1987.

2. I have personal knowledge of the facts stated herein.

3. The Office of the Attorney General of the Commonwealth of Virginia has instituted a review procedure for checking Virginia state lottery advertising to determine that it complies with the statutory mandate contained in § 51.1-4002 of the Virginia Code that "no funds shall be expended for the primary purpose of inducing persons to participate in the lottery."

4. The Attorney General has determined that the Virginia statutory and regulatory restrictions on Virginia lottery advertising apply both to the Lottery Department and Virginia retailers. Lawler Ballard Advertising, the advertising agency which was awarded the contract for

the Commonwealth's lottery advertising, has submitted all its advertising copy to the Office of the Virginia Attorney General and has obtained approval of the Attorney General before promulgating any of the lottery advertising.

5. The Virginia lottery includes games of the "instant winner" variety. To play, a participant buys a ticket at any licensed retailer. The ticket, which costs \$1.00, is imprinted with six numbers covered by a latex coating. The purchaser scratches off the coating and determines whether he or she has won. To date, the Virginia lottery has sponsored five "instant games"; each game runs approximately 8 to 10 weeks or until all the tickets are sold. Games 1, "Match Three" began on September 20, 1988. Game 2, "Money Match", began on October 20, 1988. Game 3, "Tic-Tac-Toe", began on December 15, 1988. Game 4, "Loose Change" commenced on February 16, 1989. Game 5, "Double Play", began on April 13, 1989. New "instant games" will be launched approximately every eight weeks for the duration of the lottery.

6. The first of the "on-line" games, "Pick 3", began in Virginia on May 22, 1989. These more sophisticated games are played by computer. To play a participant selects a group of numbers and finds out either daily or at the end of the week whether his or her selections have matched the numbers selected randomly by the Lottery. The Lottery anticipates beginning an additional "on-line" game, "Lotto", in early 1990. Another "on-line" game, "Pick 4", will begin in 1991. The "on-line" games will continue throughout the life of the lottery.

7. The Lottery has expended the following sums for state wide advertising for the first three instant games, excluding the cost of producing the advertisements.

Introductory Campaign (9/7-9/19)

Television	\$ 691,380.00
Radio	\$ 137,322.00
Newspapers	\$ 374,203.00
TOTAL	\$1,202,905.00

Game One (9/20-10/30)

Television	\$ 694,249.00
Radio	\$ 412,216.00
Newspaper	\$ 495,216.00
TOTAL	\$1,601,528.00

Game Two (10/20-11/27)

Television	\$ 683,319.00
Radio	\$ 337,145.00
Newspaper	\$ 525,960.00
TOTAL	\$1,467,530.00

Game Three (12/15-1/22)

Television	\$ 537,934.00
Radio	\$ 343,046.00
Newspaper	\$ 404,161.00
TOTAL	\$1,285,141.00

8. The Lottery anticipates spending between \$1 million and \$1.5 million for media buys associated with each of the instant ticket games. The Lottery anticipates spending approximately \$2.3 million for media buys associated with introducing each of the first two "on-line" games, "Pick 3" and "Lotto". The Lottery anticipates spending approximately \$3 million a year on media buys to sustain the "on-line" games.

9. The advertising sponsored by the Virginia lottery for the second instant game, "Money Match," is representative of the advertising produced by the Virginia state lottery for each of the instant games. The amount of funds expended and the type, frequency, and media used for advertising "Money Match" are typical of the expenditures and advertising for all the instant games.

10. The period for state-sponsored lottery advertising for Money Match was five and one-half weeks: October 20-23; October 24-29; October 30-November 6; November 7-12; November 13-19; November 20-27.

11. The Lottery purchases radio advertising from the following Hampton Roads radio stations: WCMS-FM, WCMS-AM, WFOG-FM, WLTY-FM, WTAR-AM, WNOR-FM, WNOR-AM, WOWI-FM, and WNVZ-FM, WCMS, WTAR, WLTY, WOWI, WNOR, and WNVZ are licensed to Norfolk. WFOG is licensed to Suffolk. The Lottery purchases television advertising from the following Hampton Roads television stations: WAVY, WVEC, WTKR, and WTVZ.

12. The Lottery purchases newspaper advertising from The Virginian-Pilot and The Ledger-Star newspapers.

13. Copies of the press releases, promulgated by the Lottery since the inception of the lottery, included in Plaintiff's response to Defendants' Motion for Summary Judgment are genuine.

14. There are approximately 1,414 business establishments in the Hampton Roads area which have been selected to sell Virginia Lottery tickets to the general public. Of those retailers who advertise, many include in their advertising copy the fact that they sell Virginia Lottery tickets.

/s/ Kenneth W. Thorson
KENNETH W. THORSON

STATE OF VIRGINIA
CITY OF RICHMOND

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Kenneth W. Thorson, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

This 15th day of June, 1989.

/s/ Sandra S. [illegible]

Notary Public

My commission expires:
Feb. 15, 1993

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-69-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

I, Paul Lucci, being first duly sworn, state as follows:

1. I am the President and General Manager of Plaintiff Edge Broadcasting Company ("Edge").
2. I have personal knowledge of the facts stated herein.
3. I have extensive knowledge and experience with all facets of the radio and television broadcasting industry, including engineering, programming, sales, management and ownership.
4. I was one of the original shareholders and founding members of the Television Corporation of Virginia, the Television Corporation of North Carolina, and the Television Corporation of Richmond, the licensees of Channel 33 in Norfolk, Channel 45 in Winston-Salem, North Carolina, and Channel 35 in Richmond, Virginia. These companies, among others, formed the public company, TVXG, the TVX Broadcasting Group, which is now believed to be the largest owner of independent television stations in the world.

5. Edge is a stock corporation existing under and by virtue of the laws of Virginia. Edge's studios and corporate offices are located in Virginia Beach, Virginia.

6. Edge owns the 100,000-watt radio station WMYK-FM. POWER 94 is the trade name for WMYK.

7. WMYK is licensed by the Federal Communications Commission ("FCC") to Elizabeth City, North Carolina, and broadcasts from Moyock, North Carolina, a town located approximately 3 miles from the Virginia/North Carolina boundary. The FCC has given POWER 94 a dual identification of Elizabeth City and Virginia Beach.

8. Those citizens of North Carolina residing within the area reached by POWER 94's signal are inundated with Virginia Lottery advertisements on the Virginia television stations, on the Virginia radio stations, and in the Virginia published newspapers.

9. No governmental interest of any kind or nature is furthered in any way by the federal laws prohibiting POWER 94 from broadcasting the same speech which reaches its North Carolina listeners via competitive radio stations, on television, and in newspapers.

10. The statutes and regulations forbidding POWER 94 from broadcasting any Virginia lottery information and advertising operate to disadvantage POWER 94 vis-a-vis its similarly situated competitors.

11. Preventing POWER 94 from broadcasting Virginia lottery advertising and information is not rationally related to any asserted governmental goal and the classification found in the challenged laws here are arbitrary and irrational.

12. I computed the statistics regarding the reach of Virginia lottery advertising in the area in North Carolina served by POWER 94 by using the Fall 1988 Arbitron Ratings for Radio, a report generally used and relied upon by people in the radio broadcasting industry to make advertising, marketing and programming decisions.

13. 92.2 percent of POWER 94's audience resides in Virginia; 7.8 percent of POWER 94's audience resides in North Carolina.

14. The signals of POWER 94 and the Virginia radio stations from which the Virginia lottery buys advertising reach the following counties in North Carolina: Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans.

15. The population estimates of these counties are: Camden, 5,000; Chowan, 11,700; Currituck, 11,900; Dare, 17,900; Gates, 8,300; Hertford, 19,900; Northampton, 18,700; Pasquotank, 25,100; and Perquimans, 9,100 or a total population estimate of 127,600. These figures are derived from the Arbitron Ratings for Radio for Fall 1988.

16. The Arbitron Ratings Company, Arbitron, compiled an estimate of the radio audience for a typical week in the Fall of 1988 for all radio stations, including POWER 94, serving the area of dominant influence (ADI), which includes the North Carolina counties reached by POWER 94's signal: Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans. Seventy-nine percent of all radio stations serving this area are licensed to locations in Virginia.

17. Within the area of North Carolina served by POWER 94 and the Virginia radio stations broadcasting Virginia lottery advertising, approximately sixty-two percent of all radio listening is directed to Virginia radio stations. Thirty-eight percent of all radio listening is directed to Virginia radio stations which broadcast Virginia lottery advertising. Eleven percent of all this radio listening is directed to POWER 94.

18. Arbitron's radio estimate establishes the "average quarter-hour audience" which gives the average number of adults, age 18 or older, in the area of dominant influence, who listened to any particular radio station during any given quarter-hour during a typical week in the Fall of 1988. On any day, during any given quarter hour,

when a Virginia radio station aired a lottery advertisement between 6:00 A.M. and midnight during the "Money Match" campaign in the area served by POWER 94's signal, an average radio audience of 4,400 North Carolinians over the age of 18 were listening to Virginia stations.

19. Few people receive all of their information from one media or even from one segment of a particular type of media. Televisions viewers tend to switch from station to station depending on programming and content. Radio listeners tend to switch from station to station. Newspaper readers also tend to read books, magazines and other periodicals in addition to a particular newspaper. The same people who watch television also listen to the radio and read newspapers.

20. There is no identifiable group of class of individuals within the area reached by POWER 94's signal that would listen exclusively to North Carolina radio stations, watch only North Carolina television stations, or read only publications published in North Carolina. In fact, Virginia television and radio stations are the predominant choice of viewers and listeners in this area.

21. The following statistics are derived from a Report, entitled "Why Radio", prepared by the Radio Advertising Bureau. This Report is generally used and relied upon by persons in the radio broadcasting industry. 96.1% of all American men and 95.7% of all American women, over the age of 18, listen to the radio during the week. American men, over the age of 18, listen to the radio an average of 2.55 hours every day. American women, over the age of 18, listen to the radio an average of 2.53 hours every day. Americans, age 12 and older, average approximately 3 hours of radio listening everyday. 99% of all American households have radios; those households have an average of 5.6 radios per household. 61% of all adults have radio at work and listen to the radio 53% of the time. 95% of all automobiles [sic] have radio; 77% of all adults are reached weekly by car radio alone.

22. Television signals generally cover a wider area than radio signals, and the television signals from WAVY, WVEC, WTKR and WTVZ reach a larger area of North Carolina than the signal transmitted by POWER 94.

23. All the North Carolina counties served by POWER 94's signal, Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, Perquimans, are also served by WAVY, WTKR, WVEC and WTVZ, the television stations from which the Virginia Lottery Board buys advertising.

24. The statistics regarding the percentage of television viewing and the number of television households in the North Carolina counties served by POWER 94's signal are derived from The Arbitron Television County Coverage Report. This Report is generally used and relied upon by individuals in the television broadcasting industry, who use the Report to make advertising, marketing and programming decisions.

25. In the North Carolina counties of Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans, 64% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

26. There are 53,200 television households in the area reached by POWER 94's signal and the Virginia television stations which broadcast Virginia lottery advertising.

27. Camden County has 2,000 households. 100% or 2,000 households have at least one television set. 89% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

28. Chowan County has 5,150 households. 98% or 5,050 households have television sets. 68% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

29. Currituck County has 5,250 households. 98% or 5,150 households have television sets. 68% of all television

viewing is directed to Virginia television stations which air Virginia lottery advertising.

30. Dare County has 7,650 households. 97% or 7,450 households have television sets. 42% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

31. Gates County has 3,150 households. 97% or 3,050 households have television sets. 82% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

32. Hertford County has 8,050 households. 99% or 7,950 households have television sets. 74% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

33. Northampton County has 7,600 households. 98% or 7,450 households have television sets. 28% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

34. Pasquotank County has 11,350 households. 99% or 11,200 households have television sets. 76% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

35. Perquimans County has 3,900 households. 100% or 3,900 households have television sets. 82% of all television viewing is directed to Virginia television stations which air Virginia lottery advertising.

36. The following statistics are derived from a Report entitled TV Basics 1987-1988, compiled by the Television Bureau of Advertising. This Report is generally used and relied upon by individuals in the television broadcasting industry. The average American watches television for seven hours and eight minutes per day.

37. American adults divide their time spent with major media as follows: watching television—60%; listening to the radio—29%; reading magazines—4%; reading newspapers—7%. Television and radio audiences alternate between various stations while watching television or listening to the radio.

38. In an average week, at 7:35 A.M., 94% of all television households are watching television; during an average week, at 4:14 P.M., 88% of all American men are watching television; in an average week, at 5:12 P.M., 91% of all American women are watching television; during an average week, at 3:08 P.M., 90% of all teenagers between the ages of 12 and 17 are watching television; during an average week, at 3:40 P.M., 92% of all children between the ages of 2 and 11 are watching television.

39. POWER 94 has difficulty in determining what type of "information" is barred by the federal laws and consequently does not broadcast any news or information concerning the Virginia lottery and has not broadcast any of the press releases provided to it by the Lottery Board.

40. WCMS-FM, WFOG-FM, WTAR-AM, WLTY-FM, WOWI-FM, WNOR-FM and WNVZ-FM, POWER 94's competitors, broadcast Virginia lottery news and press releases as a matter of course. News stories are more likely than advertising to promote the Lottery.

41. WHRO, the public television station licensed to Norfolk and broadcasting into the North Carolina counties reached by POWER 94, broadcasts live the nightly drawing of the winning numbers in the lottery's Pick-3 game. WAVY, WTKR, and WVEC also broadcast the winning numbers in Pick-3 as part of their nightly news programming.

42. The statutes and regulations prohibit POWER 94 from broadcasting newsworthy information about the Virginia lottery even though its competitors and others regularly disseminate such information within the area of North Carolina served by POWER 94's signal.

43. Some Virginia businesses, such as 7-11, have developed promotions featuring Virginia Lottery tickets. POWER 94 is unable to even carry such advertisements on any basis.

44. WOWI is POWER 94's principal competitor. WOWI has broadcast a parody based on POWER 94's

inability to run lottery advertising or engage in lottery promotions. WOWI is free to air lottery-related advertisements and consequently has gained a competitive advantage over POWER 94. A script of this parody included with Plaintiff's response to Defendants' Motion for Summary Judgment is genuine.

45. The vast majority of radio advertisements are prepared in advance and are taped rather than announced live over the air. Taping assures that the advertisement will fit in its allocated time span, that the announcer will make no mistakes, that the appropriate voice or talent is utilized, that audio effects are appropriately coordinated, and that the maximum impact is achieved. Producing a perfect tape that achieves the desired effect is difficult and requires a substantial amount of time as well as creative and artistic talent. Each part of the advertisement is intended to coordinate with the other parts to create a unified, hard hitting, effective selling message. Many establishments which sell Virginia Lottery tickets include this fact in their pre-prepared radio advertising tapes. Eliminating the reference for the Virginia Lottery from the tapes means that the tapes will run for less than the allotted time. In many cases, the elimination of the reference destroys the continuity and unity of the advertisement.

46. Radio advertisers prepare a taped advertisement for use on all radio stations in the market and do not prepare separate tapes for use on individual stations. Accordingly, if a pre-prepared taped advertisement contains a message concerning the Virginia Lottery, POWER 94 must either delete that message or refuse to run the advertisement no matter whether the deletion adversely affects the advertising copy. If POWER 94 deletes references to the Virginia Lottery from advertisements, the advertiser receives fewer seconds of exposure than the advertiser is paying for.

47. Many advertisers whose copy refers to the Virginia lottery have decided not to include POWER 94 in

or have removed POWER 94 from their advertising schedules upon learning that federal law bars POWER 94 from broadcasting any advertising which refers to the Virginia lottery. A number of advertisers have not even contacted POWER 94 because they have learned that the station is forbidden from broadcasting Virginia lottery information. Some merchants have refused to have their advertisements altered to delete Virginia lottery references and POWER 94 has been forced to reject their advertisements. For example, the following businesses wanted to advertise lottery-related messages on POWER 94 but declined to alter their advertising copy, and consequently POWER 94 was forced to reject their business:

a. POWER 94 was forced to take an advertisement for Furniture City off the air when it discovered that the ad referred to the Virginia lottery. As a result, POWER 94 lost the \$1,100.00 buy.

b. When Brown Convenience Stores learned of the federal ban on lottery-related advertising, it declined to make a proposed buy advertising its status as a lottery ticket outlet and POWER 94 lost \$6,000.00.

c. F&S Convenience Store declined to make a \$2,000.00 advertising buy after learning that POWER 94 could not air its lottery-related advertising.

d. POWER 94 was forced to take an advertisement for Bill Lewis Chevrolet off the air when it discovered that the advertisement referred to the Virginia lottery. As a result, POWER 94 lost the \$1,200.00 buy.

e. Frankie Stewart, a dance promoter, sought to purchase lottery-related advertising on POWER 94, but because the station could not run his copy, he cancelled the order and POWER 94 lost this \$400.00 buy.

f. FX, a stereo and appliance retailer, refused to allow POWER 94 to alter its advertising referring to the Virginia lottery, and consequently POWER 94 lost this \$510.00 buy.

g. In September, 1988, POWER 94 was forced to refuse 7-11's request to air \$4,000.00 worth of advertising touting 7-11's status as a lottery ticket retailer. Again in April, 1989, POWER 94 was forced to reject 7-11's request to purchase approximately \$4,000.00 worth of lottery-related advertising. 7-11 placed this lottery-related advertising on POWER 94's principal competitor, WOWI.

h. Another local business, Ebony Showcase, declined to to *[sic]* purchase advertising when it learned that it could not refer to the Virginia lottery.

i. The advertising agencies representing Gene Walters and Farm Fresh, Hampton Roads supermarket chains which sell lottery tickets, wanted to advertise their status as retailers on POWER 94 but were precluded from doing so by the federal ban on lottery-related advertising.

48. After POWER 94 offered to reduce its rates from \$40.00 to \$25.00 per announcement, Allied Showroom Catalog agreed to produce a special copy to air on POWER 94 to ensure that POWER 94 would not violate the federal ban on lottery advertising. Sentry Food Mart agreed to allow POWER 94 to delete the portion of its advertisement which touted the store as an outlet for lottery tickets, in order to ensure that POWER 94 did not violate the federal laws and regulations challenged here.

49. In the spring of this year, I personally called on Bob Wich, the chief executive of Be-Lo, to ask him to consider adding POWER 94 to the stations from which Be-Lo buys advertising on an annual basis. After extended discussions, Be-Lo agreed and POWER 94 began to run Be-Lo's advertisements in the spring. In June of 1989, Be-Lo submitted a tape touting its status as an outlet for Virginia lottery tickets. POWER 94 had to remove the tape from the air and then convince Be-Lo to produce a separate advertisement to be aired on POWER 94 only. Be-Lo reluctantly agreed to do so, but it is questionable whether it will continue to provide POWER 94 with separate advertising copy in the future.

50. None of POWER 94's advertising accounts, except for Allied Catalog Showroom, Sentry Food Mart, and Be-Lo's have been willing to tailor any lottery based advertisements in order to continue advertising on POWER 94.

/s/ Paul Lucci
PAUL LUCCI

STATE OF VIRGINIA
CITY OF NORFOLK

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Paul Lucci, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

This 20th day of June, 1989.

/s/ Paulette D. Hart
Notary Public

My commission expires:
May 8, 1992

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94, PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, DEFENDANTS

SUPPLEMENTAL AFFIDAVIT

I, Paul Lucci, being first duly sworn, state as follows:

1. I am making this Affidavit to supplement the Affidavit which I submitted in opposition to the defendants' Motion for Summary Judgment and which is part of the record in this case.

2. POWER 94 does not broadcast any information at all which pertains to the Virginia lottery. I have issued a blanket order directing my staff not to air any stories about the Virginia lottery. The law states that no "information" about a lottery may be broadcast; this broad language—prohibiting the broadcast of lottery "information"—outlaws newsworthy items.

3. I have read and consulted with my attorneys about the case law and FCC declaratory rulings in an effort to determine what items may be broadcast. I studied, for example, the FCC's Supplemental Declaratory Ruling, 21 FCC 2d 846 (February 26, 1970), stating that matters which directly promote a lottery may not be broadcast, but received little guidance from this ruling. I have not been able to apply the standard satisfactorily to decide

which stories I should not broadcast. I would also like to air news stories about the new lottery games as they come onboard, as well as other features concerning the lottery, including items about its great success and even about the participation of North Carolinians in the lottery. For instance, I would like to broadcast the numbers which are drawn daily by the Lottery Board in its first instant computer game, "Pick 3." WHRO, the local public television station licensed to Norfolk and broadcasting into the counties POWER 94 reaches in North Carolina, nightly broadcasts the drawing of the instant winning number. The other local television stations also air the winning numbers. POWER 94 does not broadcast the winning numbers because I fear that I would be prosecuted or subject to administrative penalties if I violate the law.

POWER 94 does not broadcast any lottery news items whatsoever for fear of federal prosecution. We do not broadcast any of the press releases issued by the State Lottery Department even though our radio competitors and other media which reach the same parts of North Carolina as POWER 94 broadcast this and other lottery information as a matter of course. See Plaintiff's Exhibits Nos. 29-128. For example, Plaintiff's Exhibit No. 59, a lottery press release dated Monday, September 12, 1988, features the results of a telephone survey of 1,018 adults conducted between August 3 and August 29, 1988, an item which would be of interest to our listeners. The survey revealed that a greater percentage of Virginians would vote in favor of the lottery on the day of the poll than they did in the November, 1987, referendum. The survey also revealed that two-thirds of the Virginians polled are likely to buy a lottery ticket. Our listeners care about their fellow citizens' views and responses to the lottery. I would like to air a story based on this information but would it directly promote the lottery? With my license on the line, I can not [sic] risk airing this information.

A press release dated September 19, 1988, (Plaintiff's Exhibit 62) providing the details of one of the lottery's

instant games is another example of the type of information our listeners would like to hear but which we do not air. That release provided the basics about "Match 3," one of the lottery's instant games. We would like to broadcast that \$50,000,000 in prizes were available; that 100,000,000 tickets were printed; and that the tickets would be sold on a specific day. I do not know if these facts are "information" prohibited by law, and therefore we do not broadcast it or any other information about specific lottery games.

The Virginia lottery news release of February 15, 1989, (Plaintiff's Exhibit 13) again exemplifies information we deem newsworthy but are afraid to air. This release noted that Virginia lottery ticket sales reached the \$250,000,000 mark on February 14, that Virginia had one of the best start-ups in the history of the lottery industry and that during the months of October and November of 1988 Virginia sold the greatest number of instant lottery tickets in the United States. Our listeners are interested in these facts. Does such information promote the lottery? With our license on the line, we dare not find out.

The newspaper stories included as plaintiff's Exhibits Nos. 138 through 147, 149-150, 152, 155, 157, 166, and 188 are also indicative of the types of information we would like to broadcast but do not. A front page article appearing in *The Virginian Pilot* on Friday, May 19, 1989 (Plaintiff's Exhibit No. 149) contains lottery information about the new computer games. The article reports that lottery experts say that the new daily numbers games appeal primarily to urban, working-class gamblers. This information would be of great interest to the many urban, working class listeners who make up air audience. The article answers questions like "How do I play 'Pick 3'?" "What are the odds?"; "Where do I bet?"; "How can I bet?"; "How much can I bet?"; "How often are the drawings?"; and "If I win, how do I claim my prize?" The answers to such inquiries are of interest to our listeners. Since the FCC has said that specific infor-

mation as to where, how, and when winning tickets will be drawn falls within the ambit prohibited broadcasts, POWER 94 does not broadcast specific information about the new computer games.

Another newspaper article (plaintiff's Exhibit No. 57) contains additional interesting material which POWER 94 would broadcast. On the both [sic] first and second days of the new computer game, many bettors picked the numbers 5-2-2, numbers reflecting the day on which the new computer game began. The numbers came up on the second day and the state paid \$868,950 in prizes on the 5-2-2 winning sequence while taking in only \$503,127. This material is about people like our listeners and matters to them. Similarly, an article appearing in The Virginian Pilot on Thursday, June 1, 1989, explains how Hampton Roads leads Virginia in "Pick 3" sales. (Plaintiff's exhibit 166). In the first 8 days, Hampton Roads gamblers, undoubtedly including many POWER 94 listeners, bet \$1,251,632 on the nightly number drawings. Interestingly, many bettors picked the 7-4-5 sequence, the sample number printed in a department brochure on how to play "Pick 3." The number came up and many players won. This data appeals to our listening audience. The FCC might find that it directly promotes the lottery, however, and consequently POWER 94 remains silent.

4. I also refrain from directing our staff to risk violating the law because I do not want to besmirch my reputation in the broadcast industry. As the owner of POWER 94, I cannot afford to jeopardize the station or my own integrity in any way.

5. I am well aware of POWER 94's obligation to serve the citizens of Elizabeth City, North Carolina. We strive very hard to meet this obligation. For instance, we broadcast weather warnings for Elizabeth City and the surrounding area. We provide a toll-free line for North Carolinians to reach us. We report on community issues there. We are heavily involved in public service activities

in Elizabeth City and are especially proud of our recruiting effort on the campus of Elizabeth City State University. The citizens of Elizabeth City, however, are not served by the operation of the present ban on Virginia lottery information. The majority of POWER 94's competitors and other Virginia media bombard Elizabeth City with the same information and advertising which we may not broadcast. The only effect of the laws is to deprive POWER 94 of revenues necessary to maintain our operation and to serve the residents of Elizabeth City. The law has weakened and will continue to weaken POWER 94 economically by depriving it of significant sources of revenue. To weaken POWER 94 will not serve the citizens of North Carolina.

6. The economic consequences visited upon POWER 94 by the challenged laws are serious. I have studied our client history report dated May 26, 1989, a report generated in the ordinary course of our business, which lists all of our current advertisers. (Plaintiff's Exhibit 132). Of the 999 enterprises that advertise on POWER 94, only 17 are located in North Carolina. Of all POWER 94's advertisers, .017% reside in North Carolina. As a result, POWER 94's economic existence is contingent upon its ability to attract Virginia advertisers. POWER 94 could not survive as a station if we had to rely solely upon our North Carolina advertisers. Our North Carolina competitors offer advertising at significantly lower rates. The law handicaps us in our ability to attract advertisers who wish to announce an affiliation with the Virginia lottery and bestows a real economic advantage upon our competitors.

7. The majority of the stations which broadcast Virginia lottery advertising into the area in North Carolina served by POWER 94's signal compete directly with POWER 94 for advertising revenues. Except for their cities of licensure, these stations compete for revenues on the same basis as POWER 94.

8. The following 33 American jurisdictions now operate lotteries: Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

9. Plaintiff's exhibits 133 and 134 provide examples of advertising copy submitted by potential advertisers which POWER 94 has had to reject because they contained references to the Virginia lottery.

Dated: July 19, 1989

/s/ [Illegible]

STATE OF VIRGINIA
CITY OF NORFOLK

Before me, a Notary Public of the State and City aforesaid, this day personally appeared Paul T. Lucci, who, being duly sworn, says that the foregoing Affidavit is true to the best of his information, knowledge, and belief.

/s/ Paulette D. Hart
Notary Public

My commission expires:
May 8, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 88-693-N

EDGE BROADCASTING COMPANY, t/a POWER 94,
PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, DEFENDANTS

AFFIDAVIT

I, William Eisenbeiss, being first duly sworn, do state as follows:

1. I am Vice President and Advertising Director of *The Virginian-Pilot* and *The Ledger-Star*.

2. I have personal knowledge of the facts stated herein.

3. The Lottery Board purchases advertising from *The Virginian-Pilot*, *The Ledger-Star* and *The Virginian-Pilot and The Ledger-Star* newspapers. *The Virginian-Pilot* is the morning edition; *The Ledger-Star* is the evening edition; and *The Virginian-Pilot and The Ledger-Star* is the Saturday morning and Sunday edition. These newspapers serve the following North Carolina counties: Camden, Chowan, Currituck, Dare, Gates, Hertford, Pasquotank, Perquimans, and Northampton. The Lottery Board purchases "double-truck" full-page ads, and fractional page ads concerning "Pick 3," and "Money Match" and other instant games in these newspapers. A

"double-truck" ad is one ad which covers two full left and right pages in a newspaper. The Virginia Lottery Board runs ads during introductory periods on an average of two times a week in the daily editions of *The Virginian-Pilot* and *The Ledger-Star* and one ad in the weekend editions of *The Virginian-Pilot* and *The Ledger-Star*.

4. The following statistics concerning the distribution of newspapers are based on "The Audit Bureau of Circulations, Audit Report: Newspaper, *The Virginian-Pilot* (Morning), *The Ledger-Star* (Evening), *The Virginian-Pilot* and *The Ledger-Star* (Saturday Morning and Sunday) (April 1989)." This Audit Report is generally used and relied on by those involved in the newspaper publishing industry.

5. During a weekday in which an ad appeared in the five and one-half week advertising period for the instant game, "Money Match," according to ABC figures an average of 10,377 newspapers of *The Virginian-Pilot/Ledger-Star* containing Virginia Lottery advertisements were distributed in the North Carolina counties described above.

6. On Saturdays in which an ad appeared during the five and one-half week advertising period for "Money Match," according to ABC figures, an average of 11,241 newspapers of *The Virginian-Pilot* and *The Ledger-Star* containing Virginia Lottery advertisements were distributed in the North Carolina counties described above.

7. During a Sunday in which an ad appeared during the five and one-half week advertising period for "Money Match," according to ABC figures, 12,498 newspapers of *The Virginian-Pilot* and *The Ledger-Star* containing Virginia Lottery advertisements were distributed in the North Carolina counties described above.

/s/ William Eisenbeiss
WILLIAM EISENBEISS

STATE OF VIRGINIA
CITY OF NORFOLK, to-wit:

Before me, a Notary Public in and for the State and City aforesaid this day personally appeared WILLIAM EISENBEISS, who, being duly sworn, said that the foregoing Affidavit is true to the best of his information, knowledge and belief.

Given under my hand this 14 day of July, 1989.

/s/ Della M. Holiday
Notary Public

My Commission Expires
May 5, 1990

SUPREME COURT OF THE UNITED STATES

No. 92-486

UNITED STATES AND FEDERAL COMMUNICATIONS
COMMISSION, PETITIONERS

v.

EDGE BROADCASTING COMPANY, t/a Power 94

ORDER ALLOWING CERTIORARI

Filed December 14, 1992

The petition herein for a writ of certiorari to the
United States Court of Appeals for the Fourth Circuit
is granted.

December 14, 1992